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No. 04-928

In the Supreme Court of the United States

STATE OF OREGON, PETITIONER

v.

RANDY LEE GUZEK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a defendant who has been convicted of capital murder is entitled, under the Eighth Amendment to the Constitution, to present evidence or argument that he should not be sentenced to death because of "residual doubt" about his guilt.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	8
Argument:	
The Eighth Amendment does not entitle a capital defendant to rely on "residual doubt" as a sentencing factor	10
A. The requirement of mitigating evidence in a capital case encompasses facts about the defendant's background and character and the circumstances of his offense, not "residual doubt" about whether the defendant has committed an offense in the first place	11
B. This Court's decisions support the conclusion that evidence of "residual doubt" is not a constitutionally mandated mitigating factor	17
C. There is no sound justification for a rule that "residual doubt" is a constitutionally mandated sentencing factor	25
Conclusion	30
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Arizona v. *Rumsey*, 467 U.S. 203 (1984)	8
Beardslee v. *Woodford*, 358 F.3d 560 (9th Cir.), cert. denied, 125 S. Ct. 281 (2004)	14
Bell v. *Ohio*, 438 U.S. 637 (1978)	6
Blakely v. *Washington*, 124 S. Ct. 2531 (2004)	26
Blystone v. *Pennsylvania*, 494 U.S. 299 (1990)	14, 15
Boyde v. *California*, 494 U.S. 370 (1990)	15

Cases—Continued: Page

Cage v. *Louisiana*, 489 U.S. 39 (1990) 27
California v. *Brown*, 479 U.S. 538 (1987) 15, 16
Chambers v. *Mississippi*, 410 U.S. 284 (1973) 22
Cox Broad. Corp. v. *Cohn*, 420 U.S. 469 (1975) 8
Darling v. *State*, 808 So. 2d 145 (Fla.), cert. denied, 537 U.S. 848 (2002) 21
Davis v. *United States*, 160 U.S. 469 (1895) 27
Deck v. *Missouri*, 125 S. Ct. 2007 (2005) 10
Eddings v. *Oklahoma*, 455 U.S. 104 (1982) 13
Franklin v. *Lynaugh*, 487 U.S. 164 (1988) 6, 7, 9, 17, 18, 19, 20, 21
Furman v. *Georgia*, 408 U.S. 238 (1972) 11
Green v. *Georgia*, 442 U.S. 95 (1979) 6, 22, 24
Green v. *State*, 249 S.E.2d 1 (Ga. 1978) 24
Gregg v. *Georgia*, 428 U.S. 153 (1976) 11
Grigsby v. *Mabry*, 758 F.2d 226 (8th Cir. 1985) 28
Hitchcock v. *Dugger*, 481 U.S. 393 (1987) 14
Lockett v. *Ohio*, 438 U.S. 586 (1978) 6, 12, 13, 24
Lockhart v. *McCree*, 476 U.S. 162 (1986) 18, 28
Maynard v. *Cartwright*, 486 U.S. 356 (1988) 11
McKoy v. *North Carolina*, 494 U.S. 433 (1990) 13
Mills v. *Maryland*, 486 U.S. 367 (1988) 14, 27
Penry v. *Lynaugh*, 492 U.S. 302 (1989) 11, 14, 21
People v. *Emerson*, 727 N.E.2d 302 (Ill.), cert. denied, 531 U.S. 930 (2000) 21
Saffle v. *Parks*, 494 U.S. 484 (1990) 16
Skipper v. *South Carolina*, 476 U.S. 1 (1986) 14, 15
Smith v *Balkcom*, 660 F.2d 573 (5th Cir. 1981), cert. denied, 459 U.S. 882 (1982) 26
Standard v. *Parker*, 266 F.3d 442 (6th Cir. 2001), cert. denied, 537 U.S. 831 (2002) 14
State v. *Hartman*, 42 S.W.3d 44 (Tenn. 2001) 22
Sumner v. *Shuman*, 483 U.S. 66 (1987) 15
Tennard v. *Dretke*, 124 S. Ct. 2562 (2004) 16
Tison v. *Arizona*, 481 U.S. 137 (1987) 24

Cases—Continued: Page

United States v. *Johnson*, 223 F.3d 665 (7th Cir. 2000), cert. denied, 534 U.S. 829 (2001) 14
Victor v. *Nebraska*, 511 U.S. 1 (1994) 25, 26, 27
Winship, In re, 397 U.S. 358 (1970) 27
Woodson v. *North Carolina*, 428 U.S. 280 (1976) 12
Zant v. *Stephens*, 462 U.S. 862 (1983) 12

Constitution and statutes:

U.S. Const.:
Amend. V (Double Jeopardy Clause) 8
Amend. VIII 5, 6, 8, 10, 12, 23, 24, 29
18 U.S.C. 3591-3598 (2000 & Supp. II 2002) 1
18 U.S.C. 3592(a) 1
18 U.S.C. 3593(c) (2000 & Supp. II 2002) 2
18 U.S.C. 3593(e) 2
21 U.S.C. 848 1
21 U.S.C. 848(j) 2
21 U.S.C. 848(k) 2
21 U.S.C. 848(m) 2
28 U.S.C. 1257(a) 8
Ga. Code Ann. (1972):
§ 26-801 23
§ 26-1101 23
Or. Rev. Stat. § 163.150 (2003) 5

Miscellaneous:

William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476 (1998) 28
Federal Judicial Center, *Pattern Criminal Jury Instructions* (1988) 26
William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1 (1988) 28

Miscellaneous: Page

Eric Lillquist, *Absolute Certainty and the Death Penalty*, 42 Am. Crim. L. Rev. 45 (2005) 26, 27, 28
Model Penal Code § 210.6(1)(f) (Proposed Official Draft 1962) 29
Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. Rev. 507 (1975) 26
Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty*, 83 Cornell L. Rev. 1557 (1998) 28

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INTEREST OF THE UNITED STATES

This case presents the issue whether a capital defendant is constitutionally entitled to present evidence or argument that he should not be sentenced to death because of "residual doubt" about his guilt. Congress has enacted two parallel statutory schemes establishing procedures for the imposition of the death penalty for different offenses. See 18 U.S.C. 3591-3598 (2000 & Supp. II 2002); 21 U.S.C. 848. The first of those statutory schemes requires the finder of fact to consider "any mitigating factor," including "factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence," 18 U.S.C. 3592(a), and, where a mitigating factor exists, to consider

whether the aggravating factor or factors "sufficiently outweigh" the mitigating factor or factors to justify a sentence of death, 18 U.S.C. 3593(e). The second of those schemes requires the finder of fact to consider "mitigating factors, including * * * factors in the defendant's background or character [that] mitigate against imposition of the death sentence," 21 U.S.C. 848(m), and to consider whether the aggravating factor or factors "sufficiently outweigh" the mitigating factor or factors to justify a sentence of death, 21 U.S.C. 848(k); it further provides that the finder of fact, "regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence," *ibid.* Both statutory schemes permit a defendant to present any "relevant" evidence at sentencing. 18 U.S.C. 3593(c) (2000 & Supp. II 2002); 21 U.S.C. 848(j). Whether a capital defendant has a right under these statutes to present evidence or argument pertaining to "residual doubt" at the sentencing phase of proceedings may well turn on the Court's resolution of the constitutional question presented. The United States therefore has a substantial interest in this case.

STATEMENT

1. On the night of June 28, 1987, respondent and two friends, Mark Wilson and Ross Cathey, planned to burglarize a home in Deschutes County, Oregon, that they believed contained a large amount of jewelry. They aborted the burglary, however, when they arrived at the house and determined that there were too many lights on and too many cars parked outside. Pet. App. 8; 797 P.2d 1031, 1032 (Or. 1990).

The three men decided to burglarize another home instead. Cathey suggested the home of Rod and Lois Houser; the others agreed. Respondent had previously

dated the Housers' niece, who also lived at the home; the niece had broken off the relationship, and relations between respondent and Rod Houser were not amicable. The three men went first to respondent's home, where respondent picked up a rifle and a pistol to be used in the burglary. They agreed that they would kill the Housers if the Housers were home when they arrived. Along the way, they stopped off so that respondent could show Wilson how to use the rifle. Pet. App. 8; 797 P.2d at 1032.

When the three men arrived at the Housers' home, respondent pounded on the door, and Rod Houser answered. After a short argument with Houser, respondent yelled to Wilson, "Do it!" Using the rifle, Wilson repeatedly shot Houser, killing him. Respondent ran upstairs and, using the pistol, repeatedly shot Lois Houser, killing her. The three men then ransacked the house and stole various property, including a ring that respondent took from Lois Houser's finger. The bodies of the Housers were discovered by their two daughters, who subsequently saw and identified the Housers' belongings in respondent's possession. Pet. App. 8-9; 797 P.2d at 1032.

2. Respondent was charged with two counts of aggravated murder. Cathey and Wilson confessed and pleaded guilty to reduced charges in return for testifying against respondent. 797 P.2d at 1032. During the guilt phase of the trial, respondent's grandfather testified that respondent had been with him between 9 p.m. and 2 a.m. on the night of the murders. Pet. App. 42. A jury found respondent guilty on both counts, and respondent was sentenced to death. The Oregon Supreme Court affirmed respondent's conviction, but vacated his sentence. 797 P.2d 1031. Following its decision in an earlier case (which, in turn, followed this

Court's decision in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989)), the court reasoned that respondent's death sentence was invalid because the jury was not given a general instruction that it could take into account any constitutionally relevant mitigating evidence. 797 P.2d at 1034.

3. On remand for resentencing, respondent was again sentenced to death. The Oregon Supreme Court, however, again vacated respondent's sentence, and remanded for a third sentencing proceeding. 906 P.2d 272 (1995). In a 4-3 decision, the court reasoned that the trial court's admission of victim-impact evidence in the retrial on sentencing was erroneous under the applicable version of the state death-penalty statute. See *id.* at 287.

4. a. At the third sentencing proceeding, respondent sought to introduce (1) the transcript of his since-deceased grandfather's testimony from the guilt phase that respondent had been with him from 9 p.m. to 2 a.m. on the night of the murders and (2) testimony from his mother that respondent had been at her home from shortly after 2 a.m. until at least 4:20 a.m. Pet. App. 42-43. The trial court excluded that alibi evidence. See J.A. 89 (stating that "[t]he jury is going to be told that [respondent] has been found guilty and this is the penalty phase" and that "I don't intend for evidence to be offered that's inconsistent with that representation"). Respondent was again sentenced to death.

b. In the decision under review, the Oregon Supreme Court again vacated respondent's sentence, and remanded for a fourth sentencing proceeding. Pet. App. 1-86. The State conceded on appeal, and the Oregon Supreme Court unanimously held, that the trial court erred by refusing to instruct the jury that respondent could be sentenced to life imprisonment without

the possibility of parole. *Id.* at 11-13; *id.* at 67 (Gillette, J., concurring in part and dissenting in part).

The Oregon Supreme Court proceeded to address various issues that it believed were "likely to arise on remand"—one of which was whether the trial court had erred by refusing to admit respondent's alibi evidence. Pet. App. 42-62. The court first held, by a 3-2 majority, that the trial court had erred by excluding the transcript of the grandfather's testimony, reasoning that, under state law, the transcript of any testimony from the guilt phase was admissible at the sentencing phase. *Id.* at 43-44.

The Oregon Supreme Court then held, also by a 3-2 majority, that the trial court had likewise erred by excluding the mother's testimony.[1] The court first construed the state death-penalty statute, Or. Rev. Stat. § 163.150 (2003), which instructs the jury to consider "any mitigating evidence concerning any aspect of the defendant's character or background[] or any circumstances of the offense," to permit the admission only of "evidence that a defendant is *constitutionally* entitled to introduce during the penalty phase." Pet. App. 52 (emphasis added).

Having thus construed state law, the Oregon Supreme Court proceeded to hold that respondent was entitled, under the Eighth Amendment, to present the mother's testimony at the sentencing phase of his trial.

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[1] Respondent's mother had previously testified, at the guilt phase of respondent's initial trial, that respondent had been at her home on the evening of the murders. J.A. 60-79. It appears, however, that respondent sought to present live testimony from the mother at his third sentencing proceeding, rather than to introduce a transcript of her prior testimony, and that it was for that reason that the Oregon Supreme Court analyzed the grandfather's testimony and the mother's testimony discretely. Pet. App. 43-44.

Pet. App. 52-64. The court reasoned that, in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and the companion case of *Bell* v. *Ohio*, 438 U.S. 637 (1978), this Court held that a sentencer must be able to consider "any evidence relevant to any circumstances of the offense that mitigates against imposition of the death penalty," including "evidence that a defendant played an insignificant role in the offense or otherwise possessed a less culpable *mens rea*." Pet. App. 57. The court acknowledged that respondent's evidence was inconsistent with the underlying convictions, whereas the mitigating evidence at issue in *Lockett* and *Bell* was not. *Id.* at 58. The court concluded, however, that "the foregoing factual distinction * * * [was] of no consequence" in light of this Court's decision in *Green* v. *Georgia*, 442 U.S. 95 (1979) (per curiam). Pet. App. 58. The court reasoned that *Green* stood for the proposition that, "under *Lockett*, [a] defendant's evidence that he had not participated in the murder was a relevant circumstance of the offense that the sentencer must consider." *Id.* at 60.

In a footnote, the Oregon Supreme Court distinguished this Court's decision in *Franklin* v. *Lynaugh*, 487 U.S. 164 (1988). Pet. App. 62 n.30. The court recognized that, in *Franklin*, "a plurality of the Supreme Court strongly suggested, and the concurrence would have held, that the Eighth Amendment does not require an *instruction* that a penalty-phase jury consider any *residual or lingering doubts* remaining from the guilt phase." *Ibid.* According to the court, however, "nothing in that decision lessened the direction from *Lockett* [and its progeny] that the Eighth Amendment *does* require that a defendant be permitted to *introduce*, and a jury be able to consider, *mitigating evidence relevant to any circumstances of the offense*, such as evidence that would lessen the defendant's culpability in the offense." *Id.* at 62-63 n.30. The court concluded that any "residual" doubt from the guilt phase was "qualitatively different from actual 'evidence' proffered during the penalty phase." *Id.* at 63 n.30.

Justice Gillette, joined by Chief Justice Carson, dissented in relevant part. Pet. App. 67-86. With regard to the grandfather's testimony, he reasoned that the testimony should have been excluded because the state death-penalty statute, in his view, limited the admissibility of *any* evidence to "relevant" evidence. *Id.* at 69. With regard to the mother's testimony, Justice Gillette agreed with the majority that "what the legislature intended to allow as 'mitigating' evidence was precisely what the United States Supreme Court would require pursuant to the federal constitution; nothing more, nothing less." *Id.* at 70. On the federal constitutional issue, however, he disagreed with the majority's characterization of this Court's decision in *Green*, reasoning that the defendant in *Green* sought to introduce not evidence of innocence, but rather "evidence about his minor participation in the actual killing of the victim, which was precisely the type of evidence made relevant by * * * *Lockett*." *Id.* at 73. He added that "*Green* does not mention the Eighth Amendment," and that "[a]nswering the Eighth Amendment question * * * was unnecessary to the Court's disposition of the case." *Id.* at 77.

Instead, Justice Gillette noted, "Supreme Court cases discussing 'residual doubt' arguments strongly suggest that alibi evidence is not relevant to a 'circumstance of the offense' and, therefore, the Eighth Amendment does not require its admission." Pet. App. 79. He observed that, in *Franklin*, "the plurality suggested in the strongest terms that a defendant had no consti-

tutional right to argue, during the penalty phase, that the defendant's life should be spared because there was a possibility that he was innocent." *Id.* at 80. He added that Justice O'Connor, in her concurring opinion in *Franklin*, "would have reached the constitutional issue directly and precluded any consideration of residual doubt as a mitigating factor." *Id.* at 82. "[G]iven that the Court has allowed states to bar residual doubt *arguments*," Justice Gillette concluded, "it appears to follow ineluctably that, consistent with the Eighth Amendment, the Court would allow states to exclude *evidence* that is relevant only because it would bolster those arguments." *Id.* at 83.[2]

SUMMARY OF ARGUMENT

The Eighth Amendment does not require that a capital defendant be allowed to argue that, although a jury has already determined that the defendant was guilty beyond a reasonable doubt, he should nevertheless not be sentenced to death because of "residual doubt" about his guilt. Although this Court has held that a capital defendant is entitled to present evidence

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[2] As Oregon noted in its petition for certiorari (at 3 n.3), the Oregon Supreme Court's decision was "final" for purposes of the relevant jurisdiction statute, see 28 U.S.C. 1257(a), because it falls within the third category of cases described in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975): namely, cases in which "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," *id.* at 481. If respondent were to be sentenced to death on remand notwithstanding the admission of the alibi evidence, the federal constitutional issue would be mooted; if respondent were to be sentenced to life, Oregon would be precluded from seeking resentencing by the Double Jeopardy Clause. See *Arizona* v. *Rumsey*, 467 U.S. 203, 209-212 (1984).

of mitigating factors at sentencing, it has limited the concept of constitutionally mandated mitigating evidence to two categories: evidence of the defendant's character or record, and evidence of the circumstances of the offense. Evidence of "residual doubt" is different in kind. As this Court has noted, the very concept of "mitigation" is premised on the assumption that the defendant has committed the offense for which he offers mitigating evidence. Unsurprisingly, therefore, none of this Court's cases suggests that "residual doubt" qualifies as a mitigating factor.

In *Franklin* v. *Lynaugh*, 487 U.S. 164 (1988), a plurality of this Court strongly intimated, and Justices O'Connor and Blackmun would have held, that consideration of "residual doubt" at sentencing is not constitutionally required. There is no justification for repudiating such a rule in this case. A contrary rule would improperly permit a jury, at its discretion, effectively to apply a higher standard of proof in capital sentencing than the "reasonable doubt" standard applied in all other criminal cases. Even assuming that some higher standard of proof could be discerned, the traditional "reasonable doubt" standard is sufficient to ensure that a jury does not convict a defendant when it has genuine doubts about his guilt. Although States remain free to authorize juries to consider "residual doubt" at the sentencing phase, nothing in the Constitution requires them to do so.

ARGUMENT

THE EIGHTH AMENDMENT DOES NOT ENTITLE A CAPITAL DEFENDANT TO RELY ON "RESIDUAL DOUBT" AS A SENTENCING FACTOR

The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. It does not constitute cruel and unusual punishment to preclude a defendant—whom the jury has found guilty beyond a reasonable doubt—from arguing at the sentencing phase that the jury should not sentence him to death because of "residual doubt" about his guilt. At the sentencing phase of a capital proceeding, "the jury is no longer deciding between guilt and innocence," but is instead "deciding between life and death." *Deck* v. *Missouri*, 125 S. Ct. 2007, 2014 (2005). There is no valid constitutional justification for blurring those inquiries and mandating that a jury reconsider a defendant's guilt at the sentencing phase. Nor is there a valid justification for interpreting the Constitution to mandate that the jury be allowed to deviate, at its discretion, from the traditional "reasonable doubt" standard, which appears to have been developed precisely for the purpose of protecting defendants in capital proceedings. The Oregon Supreme Court therefore erred in holding that respondent was constitutionally entitled to present evidence or argument pertaining to "residual doubt" at the sentencing phase of his trial.[3]

[3] The Oregon Supreme Court expressly held only that "any alibi evidence that [respondent] proffers in mitigation shall be admissible." Pet. App. 64. A necessary corollary of that holding, however, is that respondent was constitutionally entitled to *argue*, based on that evidence, that the jury should take into account any "residual doubt" about respondent's guilt. Were it otherwise, respondent could not have complained about the failure to admit any alibi evidence at the sentencing phase, because any such error would have been harmless. See *id.* at 69, 83-86 (Gillette, J., concurring in part and dissenting in part).

A. The Requirement Of Mitigating Evidence In A Capital Case Encompasses Facts About The Defendant's Background And Character And The Circumstances Of His Offense, Not "Residual Doubt" About Whether The Defendant Has Committed An Offense In The First Place

1. Because the death penalty is a unique sanction, this Court has frequently emphasized that it would be unconstitutional to afford a sentencer "unbridled discretion" in deciding whether to impose it. *Penry* v. *Lynaugh*, 492 U.S. 302, 326 (1989). That principle was first articulated in *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), which overturned the sentences of two defendants who were sentenced under statutes that gave the jury complete discretion to impose the death penalty. Although each of the justices in the *Furman* majority wrote separately, *Furman* has since come to stand for the proposition that "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard* v. *Cartwright*, 486 U.S. 356, 362 (1988); accord *Gregg* v. *Georgia*, 428 U.S. 153, 188-189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Consistent with the *Furman* principle, the Court has required that the trier of fact narrow the category of those eligible for the death penalty by finding at least one aggravating factor that provides reasonable justification for a more severe

sentence. See *Zant* v. *Stephens*, 462 U.S. 862, 877-878 (1983).

At the same time, in order that the sentencer in a capital case may make "an *individualized* determination [about punishment] on the basis of the character of the individual and the circumstances of the crime," *Zant*, 462 U.S. at 879, the sentencer must be allowed to consider certain mitigating factors in selecting a defendant's sentence. The concept of constitutionally required mitigating factors originated in *Woodson* v. *North Carolina*, 428 U.S. 280 (1976). In the controlling opinion in *Woodson*, Justices Stewart, Powell, and Stevens determined that North Carolina's mandatory death-penalty statute was unconstitutional because, among other reasons, it "fail[ed] to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Id.* at 303. The joint opinion concluded that "consideration of the character and record of the individual offender and the circumstances of the particular offense" was "a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304.

In *Lockett* v. *Ohio*, 438 U.S. 586 (1978), a plurality of four justices elaborated on the *Woodson* joint opinion's concept of mitigating factors. They reasoned that the *Woodson* joint opinion had left open "which facets of an offender or his offense it deemed 'relevant' in capital sentencing or what degree of consideration of 'relevant facets' it would require." *Id.* at 604. The plurality concluded that the Eighth Amendment "require[d] that the sentencer * * * not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for

a sentence less than death." *Ibid.* At the same time, however, the plurality stressed that it did not intend to "limit[] the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of *his offense*." *Id.* at 604 n.12 (emphasis added). The plurality ultimately determined that Ohio's capital-sentencing scheme was invalid because it precluded the defendant from relying at sentencing on "[t]he absence of direct proof that the defendant intended to cause the death of the victim" or "defendant's comparatively minor role in the offense." *Id.* at 608.

In *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), a majority of the Court adopted the plurality's reasoning in *Lockett*. After quoting the *Lockett* plurality's definition of mitigating factors, *id.* at 110, the Court held that evidence of a defendant's difficult family history and emotional disturbance constituted "relevant mitigating evidence" under that definition, *id.* at 115.

2. None of this Court's decisions following *Woodson*, *Lockett*, and *Eddings* contains any indication that "residual doubt" is a constitutionally mandated sentencing factor in capital proceedings. Indeed, those cases suggest that the concept of constitutionally mandated mitigating evidence is premised on the defendant's conviction of the underlying offense, and therefore does not include evidence designed to undermine that premise.

In cases addressing various aspects of a sentencer's consideration of mitigating factors, the Court has repeatedly relied on the *Lockett* plurality's definition, and has never indicated that the concept of constitutionally mandated mitigating factors extends beyond that definition's two broad categories. See, *e.g.*, *McKoy* v. *North Carolina*, 494 U.S. 433, 443 (1990) (referring to "mitigating evidence relevant to a defendant's char-

acter or record or the circumstances of the offense" (citation omitted)); *Penry*, 492 U.S. at 328 (stating that "jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime"); *Mills* v. *Maryland*, 486 U.S. 367, 374 (1988) (quoting *Lockett* plurality's definition of mitigating factors); *Skipper* v. *South Carolina*, 476 U.S. 1, 4 (1986) (same); cf. *Hitchcock* v. *Dugger*, 481 U.S. 393, 398-399 (1987) (citing *Lockett* and *Eddings* in invalidating death sentence where jury was instructed not to consider non-statutory mitigating circumstances).[4]

In discussing the concept of mitigating factors generally, and in discussing the "circumstances of the offense" category of mitigating factors specifically, the Court has consistently presupposed the defendant's factual guilt, thereby foreclosing the argument that any remaining doubt as to whether the defendant *committed* the offense constitutes a "circumstance of the offense" for mitigation purposes. See, *e.g.*, *Blystone* v. *Pennsylvania*, 494 U.S. 299, 305 (1990) (stating that it is "sufficient under *Lockett* and *Penry*" for sentencer to be allowed to consider "the mitigating circumstances present in the particular crime committed by the parti-

[4] The courts of appeals have routinely upheld the exclusion of evidence that did not fall within either of the categories of mitigating factors specified by the *Lockett* plurality. See, *e.g.*, *Beardslee* v. *Woodford*, 358 F.3d 560, 579 (9th Cir.) (evidence that co-defendants received non-capital sentences), cert. denied, 125 S. Ct. 281 (2004); *Standard* v. *Parker*, 266 F.3d 442, 461 (6th Cir. 2001) (testimony by former death-row inmate concerning death penalty generally), cert. denied, 537 U.S. 831 (2002); *United States* v. *Johnson*, 223 F.3d 665, 674-675 (7th Cir. 2000) (evidence concerning existence of maximum-security units in federal prisons), cert. denied, 534 U.S. 829 (2001).

cular defendant"); *Sumner* v. *Shuman*, 483 U.S. 66, 78-79 (1987) (noting that "[t]he fact that a life-term inmate is convicted of murder does not reflect whether any circumstance existed at the time of the murder that may have lessened his responsibility for his acts even though it could not stand as a legal defense to the murder charge," and adding that "the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime"); cf. *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (observing that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime"); *Skipper*, 476 U.S. at 13 (Powell, J., concurring) (referring to "[e]vidence concerning the degree of the defendant's participation in the crime").

The Court has also rejected arguments that the sentencer must be allowed to consider factors other than the mitigating factors specified in *Lockett* and *Eddings* in deciding whether to impose the death penalty. In *Blystone* v. *Pennsylvania*, *supra*, and *Boyde* v. *California*, 494 U.S. 370 (1990), the Court upheld state sentencing schemes that required the sentencer to impose the death penalty after determining that the aggravating circumstances outweighed the mitigating circumstances. In *Boyde*, the Court refused to accept the proposition that "the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances 'outweigh' the mitigating circumstances," reasoning that "there is no such constitutional requirement of unfettered sentencing discretion in the jury." 494 U.S. at 377. Similarly, in *California* v. *Brown*, *supra*, and *Saffle* v. *Parks*, 494 U.S. 484 (1990), the Court upheld so-called

"anti-sympathy" jury instructions, which advised the jury not to "be swayed by mere * * * sympathy," *Brown*, 479 U.S. at 539, and to "avoid any influence of sympathy," *Saffle*, 494 U.S. at 487, in deciding whether to impose the death penalty. In *Saffle*, the Court dismissed the defendant's reliance on *Lockett* and *Eddings*, reasoning that those cases held only that "the State cannot bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial," *id.* at 490, and adding that "[w]hether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant," *id.* at 493.

These cases reinforce the view that the concept of constitutionally relevant mitigating evidence presupposes that a capital defendant has committed a crime that exposes him to the death penalty, and that the mitigation question is whether features of the crime or the defendant's background or character lessen his culpability for that crime. See *Tennard* v. *Dretke*, 124 S. Ct. 2562, 2570-2572 (2004); *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). That understanding of the purpose of mitigating evidence is inconsistent with the submission that there is a constitutional right to introduce evidence, at sentencing, that *contradicts* the guilt-phase jury's conclusion that the defendant did indeed commit the offense.

B. This Court's Decisions Support The Conclusion That Evidence Of "Residual Doubt" Is Not A Constitutionally Mandated Mitigating Factor

1. In *Franklin* v. *Lynaugh*, 487 U.S. 164 (1988), this Court was presented with the question whether "residual doubt" is a constitutionally mandated sentencing factor. Although the Court did not definitively resolve that question, two members of the Court would have held, and a four-Justice plurality strongly intimated, that consideration of "residual doubt" is not constitutionally required. The reasoning given in support of that conclusion is correct.

a. The defendant in *Franklin* was charged with the murder of a woman who had been stabbed and left for dead and who later died in hospital. 487 U.S. at 167. During the guilt phase of his trial, the defendant contended that he had been mistakenly identified and that, even assuming that he was the person who had committed the stabbing, the victim's death was the result of incompetent medical treatment. *Id.* at 168. The defendant was found guilty of capital murder. *Ibid.* During the penalty phase, the defendant proposed jury instructions that "would have told the jury that any evidence considered by them to mitigate against the death penalty should be taken into account in answering" Texas's "special issues," even if the jury would otherwise have answered yes to those issues. *Id.* at 169-170. The trial court declined to give those instructions, and the defendant was sentenced to death. *Id.* at 170. Before this Court, the defendant contended, *inter alia*, that, because "the jury may, in its penalty deliberations, have harbored 'residual doubts'" about his guilt, "the jury should have been instructed that it could

consider any such doubts in arriving at its answers to the Special Issues." *Id.* at 172.

This Court upheld the defendant's death sentence. In an opinion written by Justice White and joined by the Chief Justice and Justices Scalia and Kennedy, a plurality of the Court noted that "this Court has never held that a capital defendant has a constitutional right to an instruction telling the jury to revisit the question of his identity as the murderer as a basis for mitigation." 487 U.S. at 172-173. The plurality rejected the defendant's contention that *Lockhart* v. *McCree*, 476 U.S. 162 (1986), supported such a constitutional right. 487 U.S. at 173. In *Lockhart*, the Court had upheld the removal for cause, before the guilt phase, of jurors whose opposition to the death penalty was so strong that it would substantially impair the performance of their duties at the sentencing phase. 476 U.S. at 165. In so holding, the Court had reasoned that States had an interest in obtaining a single jury for both the guilt and sentencing phases of a defendant's trial, because of "the possibility that, in at least some capital cases, the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase." *Id.* at 181. The *Franklin* plurality reasoned that *Lockhart* stood only for "the simple truism that *where* 'States are willing to * * * allow defendants to capitalize on "residual doubts,'" such doubts will inure to the defendant's benefit." 487 U.S. at 173 (quoting *Lockhart*, 476 U.S. at 181). Like the dissenting opinion in *Lockhart*, the plurality noted that the Court had not "struck down the practice in some States of prohibiting the consideration of 'residual doubts' [at sentencing]." *Ibid.* (citing *Lockhart*, 476 U.S. at 205-206 (Marshall, J., dissenting)). The plurality concluded that "*Lockhart* did not endorse

capital sentencing schemes which permit such use of 'residual doubts,' let alone suggest that capital defendants have a *right* to demand jury consideration of 'residual doubts' in the sentencing phase." *Ibid.*

The *Franklin* plurality similarly rejected the defendant's reliance on *Lockett* and *Eddings*. 487 U.S. at 174. The plurality reasoned that the rule of *Lockett* and *Eddings* "in no way mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt." *Ibid.* "Such lingering doubts," the plurality continued, "are not over any aspect of petitioner's 'character,' 'record,' or a 'circumstance of the offense.'" *Ibid.* The plurality thus concluded that "[t]his Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor." *Ibid.*[5]

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[5] In a footnote, the plurality reasoned that a constitutional entitlement to rely on "residual doubt" at the sentencing phase would be "arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where a death sentence—but not the underlying conviction—is struck down on appeal." *Franklin*, 487 U.S. at 173 n.6; accord *id.* at 188 (O'Connor, J., concurring in the judgment). That reasoning was correct. A jury empaneled solely for the purpose of determining a defendant's sentence would obviously have no "residual" doubt from any prior guilt phase. And if consideration of some level of doubt short of "reasonable doubt" were constitutionally mandated at sentencing, a defendant in a sentencing-only proceeding would presumably be entitled to re-introduce any evidence of innocence from the guilt phase—and the State would presumably be entitled to meet that evidence with any evidence of guilt. As a result, such a "sentencing-only" proceeding would effectively be transformed into a full retrial, at which the defendant could relitigate his guilt before a new jury. That possibility is amply illustrated by the multiple resentencings that have occurred (and will occur) in this case. If the court below is correct, evidence from the guilt-phase

Ultimately, however, the plurality reasoned that, "even if such a right existed, nothing done by the trial court impaired [the defendant's] exercise of this 'right.'" 487 U.S. at 174. The plurality noted that the defendant was given the opportunity to "press the 'residual doubts' question" with the jury at sentencing, *ibid.*, and further observed that the defendant "did not draw the jury's attention to the 'residual guilt' question" in his closing argument, *id.* at 175 n.7. Moreover, the plurality determined that the trial court's rejection of the defendant's proposed jury instructions was "without impact on the jury's consideration of the 'residual doubts' issue" because, among other reasons, the defendant's instructions "offered *no* specific direction to the jury concerning the potential consideration of 'residual doubt.'" *Id.* at 174.[6]

b. Justice O'Connor, joined by Justice Blackmun, concurred in the judgment. Justice O'Connor disagreed with the plurality's view that "the special verdict questions did not prevent the jury from giving mitigating effect to its 'residual doubt[s]' about [the defendant's] guilt." 487 U.S. at 187. She therefore reached the constitutional question raised by the defendant, and concluded that the Eighth Amendment did not require consideration of "residual doubt." *Ibid.* Like the plurality, Justice O'Connor observed that "[o]ur cases do not support the proposition that a defendant who has

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trial will be admissible each time a new sentencing is ordered based on other errors.

[6] Although dissenting on other grounds, Justice Stevens, joined by Justices Brennan and Marshall, stated that he "d[id] not disagree" with the plurality's explanation "why in this case there was no interference with any right petitioner may have had under the Eighth Amendment to have the jury consider 'residual doubt' in making its sentencing determination." 487 U.S. at 189.

been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt." *Ibid.* Citing *Lockhart*, she noted that, while some States "permit[ted] defendants in some cases to enjoy the benefit of doubts that linger from the guilt phase of the trial," "we have never indicated that the Eighth Amendment requires States to adopt such procedures." *Id.* at 187-188.

Justice O'Connor agreed with the plurality that *Lockett* and *Eddings* provided no support for the defendant's claim, because "'residual doubt' about guilt is not a mitigating circumstance." 487 U.S. at 188. She reasoned that "'[r]esidual doubt' is not a fact about the defendant or the circumstances of the crime." *Ibid.* Instead, "[i]t is * * * a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'" *Ibid.* "Nothing in our cases," Justice O'Connor concluded, "mandates the imposition of this heightened burden of proof at capital sentencing." *Ibid.*

c. Although the Court did not squarely hold in *Franklin* that "residual doubt" was not a constitutionally mandated sentencing factor, this Court noted the following Term that "a majority [in *Franklin*] agreed" that consideration of "residual doubt" was not constitutionally required. *Penry*, 492 U.S. at 320 (citing *Franklin*, 487 U.S. at 173 & n.6 (plurality opinion), and *id.* at 187-188 (O'Connor, J., concurring in the judgment)). Lower courts have repeatedly read *Franklin* at least as broadly. See, *e.g.*, *Darling* v. *State*, 808 So. 2d 145, 162 (Fla.) (citing this Court's "holding" in *Franklin* that "there is no constitutional right to present 'lingering doubt' evidence"), cert. denied, 537 U.S. 848 (2002); *People* v. *Emerson*, 727 N.E.2d 302, 338

(Ill.) (noting that *Franklin* "held that a defendant has no right to present evidence of residual doubt at the second stage of sentencing"), cert. denied, 531 U.S. 930 (2000); *State* v. *Hartman*, 42 S.W.3d 44, 55 (Tenn. 2001) (stating, citing *Franklin*, that this Court "has held that there is no constitutional right to have residual doubt considered as a mitigating factor in a capital sentencing hearing").

2. In holding that respondent was constitutionally entitled to present alibi evidence at the sentencing phase of his trial, the Oregon Supreme Court relied heavily on this Court's decision in *Green* v. *Georgia*, 442 U.S. 95 (1979) (per curiam). *Green*, however, does not suggest that "residual doubt" is a constitutionally mandated sentencing factor in capital proceedings.

In *Green*, the Court reversed a death sentence on the ground that the exclusion of certain hearsay testimony violated due process. 442 U.S. at 97. The evidence at trial indicated that the defendant and his co-defendant had abducted the victim and, "acting either in concert or separately, raped and murdered her." *Id.* at 96. Green sought to introduce, at the sentencing phase (but apparently not at the guilt phase), the testimony of a witness who claimed that the co-defendant had told him that the co-defendant, and not Green, had actually killed the victim. *Ibid.* Although that testimony was admitted against the co-defendant in his earlier trial, it was excluded as hearsay at Green's trial. *Id.* at 97. Relying on *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), the Court concluded that, "[i]n these unique circumstances," application of the hearsay rule violated due process. 442 U.S. at 97.

In so holding, the Court noted that "[t]he excluded testimony was highly relevant to a critical issue in the punishment phase of the trial." *Green*, 442 U.S. at 97.

That single statement certainly does not represent an Eighth Amendment holding that "residual doubt" is a mandatory sentencing factor. The Court did not identify "residual doubt" about guilt as the "critical issue" at the punishment phase, and the better reading of the opinion is that the relevant issue was the defendant's role in, and the circumstances of, the offense. The testimony at issue in *Green* suggested that Green had not directly killed the victim himself; it did not suggest, however, that Green was not legally accountable (*i.e.*, not guilty) of the murder under accomplice-liability principles. If Green had been charged with and convicted of directly committing the murder himself, the testimony would have tended to prove that he was innocent—and thus would have constituted evidence bearing on "residual doubt." But if Green had been convicted of committing felony murder (or of aiding and abetting in the commission of the murder), the testimony would have tended to prove only that he had a minor role in the offense—and thus would have constituted mitigating evidence relevant to the circumstances of the offense.[7] This Court appears to have assumed that Green had been convicted, at least in the alternative, on the latter theory. See *id.* at 96 (noting that the evidence tended to show that defendant, "acting either in concert or separately," raped and murdered the victim).[8]

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[7] Then, as now, Georgia law permitted imposition of the death penalty for felony murder (and for aiding and abetting in the commission of a murder). See Ga. Code Ann. §§ 26-801, 26-1101 (1972).

[8] Similarly, in the decision under review in *Green*, the Georgia Supreme Court acknowledged that whether a defendant's participation in a murder committed by another person was "relatively minor" could be a "mitigating circumstance," but rejected Green's

That reading of *Green* is confirmed by the fact that, after making the statement quoted above, the Court cited not only the plurality opinion from *Lockett*, but also Justice Blackmun's concurring opinion. *Green*, 442 U.S. at 97. In the cited portion of that opinion, Justice Blackmun endorsed the limited proposition that it was unconstitutional to impose the death penalty on a defendant "who only aided and abetted a murder, without permitting any consideration * * * of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide." *Lockett*, 438 U.S. at 613 (opinion concurring in part and concurring in the judgment).[9] The Court's citation of Justice Blackmun's concurring opinion would have made no sense if Green had been convicted simply of committing the murder himself, because Justice Blackmun's opinion addressed only the situation in which a defendant had aided and abetted in a murder committed by another, as in the case of felony murder. To the extent that *Green*—which was explicitly decided only on due-process grounds—could be said to have held anything about the Eighth Amendment, therefore, it stands only for the now-settled proposition that evidence that a defendant played a minor role in the offense constitutes relevant evidence of "the circumstances of the offense" for mitigation purposes—not for the novel proposition

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contention on the facts that the testimony demonstrated that his role in the offense was in fact minor. See *Green* v. *State*, 249 S.E.2d 1, 9-10 (Ga. 1978).

[9] In *Tison* v. *Arizona*, 481 U.S. 137 (1987), the Court subsequently upheld the constitutionality of imposing the death penalty in a felony-murder case on the basis of "major participation in the felony committed, combined with reckless indifference to human life." *Id.* at 158.

that evidence that contradicts a finding of guilt must be considered at the sentencing phase.[10]

C. There Is No Sound Justification For A Rule That "Residual Doubt" Is A Constitutionally Mandated Sentencing Factor

Finally, this Court should refuse to adopt an unprecedented constitutional rule that a capital defendant is entitled at sentencing to present evidence or argument pertaining to "residual doubt" because such a rule would improperly permit a jury, at its discretion, effectively to apply a higher standard of proof in capital cases than the "reasonable doubt" standard applied in all other criminal cases.

As a practical matter, because "residual doubt" must mean something less than a "reasonable doubt," it must amount to an unreasonable or irrational doubt—that is, a doubt based on speculation, surmise, or subjective intuition, rather than fact. Cf. *Victor* v. *Nebraska*, 511 U.S. 1, 17 (1994) ("A fanciful doubt is not a reasonable doubt.").[11] One court of appeals defined the concept of "residual doubt" thus: "There may be no *reasonable* doubt—doubt based upon reason—and yet some *genuine* doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several."

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[10] The opinions in *Franklin* further confirm this reading of *Green*. Neither the plurality opinion nor Justice O'Connor's concurring opinion in *Franklin* so much as cited *Green*—as one would naturally expect if the *Green* Court had in any way suggested that "residual doubt" was a constitutionally mandated sentencing factor.

[11] On the other hand, if "residual doubt" does not mean something less than a "reasonable doubt," its only role would be to allow the jury at the sentencing phase to second-guess the determination of the jury at the guilt phase. See p. 19 note 5, *supra*.

Smith v. *Balkcom*, 660 F.2d 573, 580 (5th Cir. 1981), cert. denied, 459 U.S. 882 (1982). A "mere possibility" or "whimsy" standard, however, cannot serve as a sensible basis for a jury to act.

In addition, the "reasonable doubt" standard has long been understood as "the most exacting standard of proof," Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 Am. Crim. L. Rev. 45, 51 (2005) (Lillquist), and "proof beyond a reasonable doubt" has been defined as "proof that leaves [the jury] firmly convinced of the defendant's guilt," Federal Judicial Center, *Pattern Criminal Jury Instructions* 28 (1988); cf. *Victor*, 511 U.S. at 27 (Ginsburg, J., concurring in part and concurring in the judgment) (citing pattern instruction with approval). Injecting an additional, amorphous "residual doubt" standard into capital sentencing would likely foster jury confusion and invite speculation about whether absolute certainty is required for a verdict—a standard that could well be thought to be unattainable.

Even assuming that some higher standard of proof short of absolute certainty were susceptible of precise articulation, however, there is no justification for a constitutional rule that would permit a jury to deviate from the "reasonable doubt" standard. That venerable standard dates from the founding of the Republic, see Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. Rev. 507, 516-518 (1975) (tracing standard to Boston Massacre trials), and appears to have been developed precisely to guarantee that only the truly guilty were subjected to the death penalty, which was then available for most felonies, see Lillquist, *supra*, 42 Am. Crim. L. Rev. at 51; *Blakely* v. *Washington*, 124 S. Ct.

2531, 2559 (2004) (Breyer, J., dissenting).[12] The reasonable-doubt standard is designed to permit the criminal-justice system to provide strong protection for a defendant's interests without imposing a paralyzing requirement of absolute certainty. See *Victor*, 511 U.S. at 13-14. Assuming *arguendo* that there were some reason to believe that juries in capital cases were convicting defendants despite genuine doubts that defendants were guilty, the proper solution would be to ensure that juries are properly instructed about "reasonable doubt" at the guilt phase—not to require that juries be allowed, at their discretion, to take unreasonable or irrational doubts into account at the sentencing phase.[13] A system that allowed juries—or even a single juror, see *Mills*, 486 U.S. at 384—to invent and then apply a higher standard of proof for capital sentences would "highlight that the standard of proof in other criminal cases is lower, and thereby lead to less

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[12] It was only later that the "reasonable doubt" standard came to be used in other criminal cases, see Lillquist, *supra*, 42 Am. Crim. L. Rev. at 51, and to be formally adopted by this Court as the minimum standard required in criminal cases by due process, see *In re Winship*, 397 U.S. 358, 364 (1970); cf. *Davis* v. *United States*, 160 U.S. 469, 493 (1895) (holding, with regard to insanity defense in capital-murder case, that "[n]o man should be deprived of his life * * * unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged").

[13] This Court has held that a jury need not be given an instruction specifically defining "reasonable doubt," see *Victor*, 511 U.S. at 5, but has invalidated an instruction that defined "reasonable doubt" as "such doubt as would give rise to a grave uncertainty" and "an actual substantial doubt," *Cage* v. *Louisiana*, 498 U.S. 39, 40 (1990) (per curiam) (quoting jury instruction) (emphasis omitted).

respect for guilty verdicts in noncapital cases," Lillquist, *supra*, 42 Am. Crim. L. Rev. at 67.

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In *Lockhart* v. *McCree*, *supra*, this Court noted, quoting the dissenting opinion below, that "residual doubt has been recognized as an extremely effective argument for defendants in capital cases." 476 U.S. at 181 (quoting *Grigsby* v. *Mabry*, 758 F.2d 226, 248 (8th Cir. 1985) (opinion of Gibson, J.)). In fact, studies have reached somewhat conflicting results on the efficacy of relying on "residual doubt."[14] Nevertheless, if States wish to authorize the practice of considering "residual doubt" as a sentencing factor in capital proceedings, they can of course do so—as a number of States have

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[14] Compare, *e.g.*, William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 28 (1988) (concluding, in study of jurors in ten cases in State that did not allow consideration of "residual doubt" as a sentencing factor, that "[t]he existence of [either 'reasonable' or 'residual'] doubt about the guilt of the accused was the most often recurring explanatory factor" in cases in which the jury recommended life), with Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty*, 83 Cornell L. Rev. 1557, 1577 (1998) (concluding, in study of jurors in 17 cases in which the defendant denied guilt, that "residual doubt" strategy "may actually increase the likelihood that the jury will reach a sentence of death," except to the extent that it suggests that the defendant played a minor role in a murder involving multiple actors); cf. William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476, 1527 (1998) (noting that, in some cases, "jurors with some doubts, possibly reasonable doubts, about a capital murder verdict * * * may have agreed to vote guilty of capital murder in exchange for an agreement with [other] jurors to abandon the death penalty").

done.[15] The Eighth Amendment, however, permits States to confine consideration of guilt and innocence to the guilt phase and to require the sentencer to focus on other considerations at the sentencing phase. Because the Eighth Amendment does not require further consideration of "residual doubt" once a defendant has been convicted on proof beyond a reasonable doubt, the Oregon Supreme Court's decision was erroneous.

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[15] No State has adopted statutory language that expressly allows a jury to take "residual doubt" into account at sentencing. Cf. Model Penal Code § 210.6(1)(f) (Proposed Official Draft 1962) (prohibiting the imposition of the death penalty where, "although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt"). However, courts in seven States (Arizona, California, Georgia, Indiana, Missouri, Oklahoma, and Tennessee) have authoritatively construed their capital sentencing statutes to require consideration of "residual doubt." On the other hand, nine States (Florida, Illinois, Montana, Nebraska, New Jersey, Ohio, Oregon, Virginia, and Wyoming) have capital sentencing statutes that foreclose, or have been authoritatively construed to foreclose, consideration of "residual doubt." The remaining 22 States with capital punishment have statutes that could arguably be read to allow consideration of "residual doubt" but have not yet been authoritatively construed by the courts. (Courts in some of those States have implicitly sanctioned the consideration of "residual doubt" by evaluating counsel's effectiveness (or ineffectiveness) in choosing to pursue (or not to pursue) a "residual doubt" strategy at sentencing; courts in other of those States have arguably precluded the consideration of "residual doubt" by holding that there is no federal constitutional right to its consideration, without separately addressing whether there is a similar right under state law.) A list of relevant statutes and cases is set forth in an appendix to this brief.

CONCLUSION

The judgment of the Oregon Supreme Court should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

STATE LAW ON "RESIDUAL DOUBT"

Alabama: Ala. Code § 13A-5-52 (2004) ("[M]itigating circumstances shall include * * * any other relevant mitigating circumstance which the defendant offers as a basis for life imprisonment without parole instead of death."); *Melson* v. *State*, 775 So. 2d 857, 898-899 (Ala. Crim. App. 1999) (federal law provides no right to demand jury consideration of residual doubt).

Arizona: 2005 Ariz. Legis. Serv. ch. 325(G) (West) ("The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death."); *State* v. *Jones*, 4 P.3d 345, 369 (Ariz. 2000) (state law allows argument on residual doubt).

Arkansas: Ark. Code Ann. § 5-4-602(4) (West 2005) ("[M]itigation evidence must be relevant to the issue of punishment."); *Id.* § 5-4-603(a)(3) (the jury, in addition to weighing the mitigating and aggravating factors, must find that "aggravating circumstances justify a sentence of death beyond a reasonable doubt"); *Ruiz* v. *State*, 772 S.W.2d 297, 308 (Ark. 1989) (federal law provides no right to demand jury instruction on residual doubt).

California: Cal. Penal Code § 190.3(k) (West 2005) ("In determining the penalty, the trier of fact shall take into account * * * [a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."); *People* v. *Musselwhite*, 954 P.2d 475, 510 (Cal. 1998) (state law allows defendant to argue and present evidence on

residual doubt, although he is not entitled to a jury instruction on it).

Colorado: Colo. Rev. Stat. Ann. § 18-1.3-1201(4)(l) (West 2005) (mitigating factors include "[a]ny other evidence which in the court's opinion bears on the question of mitigation").

Connecticut: Conn. Gen. Stat. Ann. § 53a-46a(d) (West 2005) (trier of fact "shall first determine whether a particular factor concerning the defendant's character, background or history, or the nature and circumstances of the crime, has been established by the evidence, and shall determine further whether that factor is mitigating in nature, considering all the facts and circumstances of the case"); *State* v. *Breton*, 824 A.2d 778, 838-839 & n.65 (Conn. 2003) (state law apparently allows for residual doubt because it was submitted to the jury as one of the mitigating factors).

Delaware: Del. Code Ann. tit. 11, § 4209(c) (2005) (no list of mitigating circumstances); *Shelton* v. *State*, 744 A.2d 465, 495-497 (Del. 2000) (federal law provides no right to residual doubt, but state law allows defendant to discuss or argue in allocution facts already in evidence either in the guilt or penalty phase, as well as in some circumstances to present at the penalty phase new evidence relating to the circumstances of the crime).

Florida: Fla. Stat. Ann. § 921.141(2)(c) (West 2005) (jury not only weighs the factors, but separately determines whether "[b]ased on these considerations, * * * the defendant should be sentenced to life imprisonment or death"); *Aldridge* v. *State*, 503 So. 2d 1257, 1259 (Fla. 1987) (residual doubt is not a mitigating factor under state law).

Georgia: Ga. Code Ann. § 17-10-30 (2005) (trier may consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law"); *Taylor* v. *State*, 404 S.E.2d 255, 262 (Ga. 1991) (state law allows argument on residual doubt, but does not require a jury instruction on it); *Romine* v. *State*, 350 S.E.2d 446, 453 (Ga. 1986) (noting that "evidence relating to guilt or innocence is relevant to sentence").

Idaho: 2005 Idaho Sess. Laws ch. 152 (no list of mitigating factors); *State* v. *Hairston*, 988 P.2d 1170, 1191 (Idaho 1999) (trial court apparently not required to consider lingering doubt under state law because the question was already determined by the jury during the guilt phase).

Illinois: 720 Ill. Comp. Stat. Ann. 5/9-1(c) (West 2005) (list of mitigating factors is not exclusive); *People* v. *McDonald*, 660 N.E.2d 832, 847-848 (Ill. 1995) (residual doubt is not allowed under state law).

Indiana: Ind. Code Ann. § 35-50-2-9(c) (West 2005) (mitigating factors include "[a]ny other circumstances appropriate for consideration"); *Dye* v. *State*, 717 N.E.2d 5, 21-22 (Ind. 1999) (residual doubt is allowed under state law because court considered evidence and decided there was not residual doubt).

Kansas: Kan. Stat. Ann. § 21-4626 (2005) (list of mitigating circumstances is not exhaustive).

Kentucky: Ky. Rev. Stat. Ann. § 532.025(2) (West 2005) (jury can consider "any mitigating circumstances * * * otherwise authorized by law * * * which may be supported by the evidence"); *Bussell* v. *Commonwealth*, 882 S.W.2d 111, 115 (Ky. 1994) (federal law provides no right to consider residual doubt as a mitigating circumstance).

Louisiana: La. Code Crim. Proc. Ann. art. 905.5(h) (West 2005) (jury may consider "[a]ny other relevant mitigating circumstance").

Maryland: Md. Code Ann., Crim. Law § 2-303(h)(2)(viii) (West 2005) (mitigating circumstances include "any other fact that the court or jury specifically sets forth in writing as a mitigating circumstance in the case"); *Hunt* v. *State*, 583 A.2d 218, 247 (Md. 1990) (federal law provides no right to have sentencing jury consider residual doubt).

Mississippi: Miss. Code Ann. § 99-19-101(6) (2005) (list of relevant mitigating factors is exhaustive); *Holland* v. *State*, 705 So. 2d 307, 325-327 (Miss. 1997) (federal law allows for argument, but not an instruction or evidence, on residual doubt).

Missouri: Mo. Rev. Stat. § 565.030(4)(4) (2005) (even after doing the weighing, trier can decide "under all of the circumstances not to assess and declare the punishment at death"); *Id.* § 565.035.3(3) (court shall consider "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant"); *State* v. *Chaney*, 967 S.W.2d 47, 59-60 (Mo. 1998) (state statute requires sentencing court to consider the strength of the evidence in determining whether the death penalty is excessive or disproportionate to other cases); *Jones* v. *State*, 784 S.W.2d 789, 793 (Mo. 1990) (state law appears to allow for residual doubt because defendant asserted that counsel was incompetent for failing to seek an instruction on it and court did not state that such a strategy was wrong, only that counsel was not ineffective).

Montana: Mont. Code Ann. § 46-18-304(2) (2005) ("The court may consider any other fact that exists in mitigation of the penalty."); *Gollehon* v. *State*, 986 P.2d 395, 400 (Mont. 1999) (residual doubt is not an appropriate mitigating factor under state law).

Nebraska: Neb. Rev. Stat. § 29-2523 (2005) (list of mitigating circumstances is exhaustive).

Nevada: Nev. Rev. Stat. § 175.554 (2005) (no list of mitigating circumstances); *Middleton* v. *State*, 968 P.2d 296, 313 (Nev. 1998) (federal law provides no right to an instruction on residual doubt).

New Hampshire: N.H. Rev. Stat. Ann. § 630:5IV (2005) ("The jury, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.").

New Jersey: N.J. Stat. Ann. § 2C:11-3(5)(h) (West 2005) (list of mitigating circumstances is exhaustive); *State* v. *Josephs*, 803 A.2d 1074, 1116-1117 (N.J. 2002) (residual doubt is not a mitigating circumstance under state law).

New Mexico: N.M. Stat. Ann. § 31-20A-6 (West 2005) (list of mitigating factors is not exhaustive); *Id.* § 31-20A-2(B) (trier, in addition to weighing the mitigating and aggravating circumstances, "consider[s] both the defendant and the crime").

New York: N.Y. Crim. Proc. Law § 400.27(9)(f) (McKinney 2005) ("Any other circumstance concerning the crime * * * that would be relevant to mitigation or punishment for the crime."); *Id.* § 400.27(11)(a) (jury, in addition to weighing the aggravating and mitigating factors, must "unanimously determine[] that the penalty of death should be imposed"); *People* v. *Harris*,

676 N.Y.S.2d 440, 443 (N.Y. Sup. Ct. 1998) (federal law provides no right to residual doubt as a mitigating factor).

North Carolina: N.C. Gen. Stat. Ann. § 15A-2000(9) (West 2005) ("Any other circumstance arising from the evidence which the jury deems to have mitigating value."); *State* v. *Hill*, 417 S.E.2d 765, 778-779 (N.C. 1992) (federal law provides no right to residual doubt as a mitigating circumstance).

Ohio: Ohio Rev. Code Ann. § 2929.04(7) (West 2005) ("Any other factors that are relevant to the issue of whether the offender should be sentenced to death."); *State* v. *McGuire*, 686 N.E.2d 1112, 1122-1123 (Ohio 1997) (defendant is not entitled to an instruction on residual doubt under state law although, in the past, residual doubt could be a mitigating factor).

Oklahoma: Okla. Stat. Ann. tit. 21, § 701.10(c) (West 2005) (no list of mitigating circumstances); *Cummings* v. *State*, 968 P.2d 821, 838 (Okla. Crim. App. 1998) (state law allows for consideration of residual doubt evidence).

Oregon: Or. Rev. Stat. § 163.150(c)(A) (2005) (list of mitigating circumstances is not exhaustive); Pet. App. 52 (residual doubt is not a mitigating circumstance under state law).

Pennsylvania: 42 Pa. Cons. Stat. Ann. § 9711(e)(8) (West 2005) ("Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense."); *Commonwealth* v. *Meadows*, 787 A.2d 312, 320-321 (Pa. 2001) (state law apparently allows for residual doubt because court approved of trial counsel's decision to strategically rely on residual doubt).

South Carolina: S.C. Code Ann. § 16-3-20(c) (2005) ("[T]he judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law."); *State* v. *Southerland*, 447 S.E.2d 862, 868 (S.C. 1994) (federal law provides no right to residual doubt as a mitigating factor).

South Dakota: S.D. Codified Laws § 23A-27A-1 (2005) (no list of mitigating factors); *State* v. *Moeller*, 616 N.W.2d 424, 457-458 & 465 n.18 (S.D. 2000) (state law apparently allows for residual doubt because defense counsel sought an instruction including residual doubt as one of the factors and it was denied, but there was no discussion that residual doubt is not a mitigating factor).

Tennessee: Tenn. Code Ann. § 39-13-204(j)(9) (2005) ("Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing."); *State* v. *Thomas*, 158 S.W.3d 361, 403 (Tenn. 2005) (residual doubt is a non-statutory mitigating circumstance under state law).

Texas: Tex. Crim. Code Ann. art. 37.071(d)(1) (West 2005) (jury "shall consider all evidence admitted at the guilt or innocence stage and the punishment stage."); *Blue* v. *State*, 125 S.W.3d 491, 502-503 (Tex. Crim. App. 2003) (court noted in dicta that defendant had the opportunity to argue residual doubt and that there was no claim that he was prevented from presenting any evidence, notwithstanding that *Franklin* is controlling with regard to jury-instruction issue).

Utah: Utah Code Ann. § 76-3-207(4)(g) (2005) ("Any other fact in mitigation of the penalty."); *Id.* § 76-3-

207(5)(b) (death penalty is only imposed if, after weighing the factors, the jury "is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances"); *State* v. *Young*, 853 P.2d 327, 365 (Utah 1993) (federal law provides no right to an instruction on residual doubt).

Virginia: Va. Code Ann. § 19.2-264.4(B) (2005) (list of mitigating factors is not exhaustive); *Frye* v. *Commonwealth*, 345 S.E.2d 267, 283 (Va. 1986) (residual doubt cannot be argued and no evidence on residual doubt is permitted under state law).

Washington: Wash. Rev. Code § 10.95.070 (2005) (list is not exhaustive); *In re Personal Restraint of Lord*, 868 P.2d 835, 857 n.13 (Wash. 1994) (state law does not appear to preclude the possibility of residual doubt as a mitigating factor in jury instructions).

Wyoming: Wyo. Stat. Ann. § 6-2-102(j)(viii) (2005) (list of mitigating factors is exhaustive).